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IN THE

United States Supreme Court

OCTOBER TERM, 1973

No. ————————

ANTHONY SEYMOUR BRADFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the entitled case on March 28, 1974.

CITATION TO OPINIONS BELOW

Judgment without opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, was entered following the trial by jury and conviction of the Petitioner for obstructing correspondence in violation of 18 U.S.C., § 1702. The opinion of the United States Court of Appeals for the Seventh Circuit affirming judgment, not yet reported, is reprinted in Appendix A, page 2A

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 28, 1974, and is reprinted in Appendix A, page 1A. Rehearing was not sought. The jurisdiction of the Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

1. Is fourth class mail "correspondence" for purposes of the provisions of 18 U.S.C., § 1702, pertaining to the obstruction of "correspondence"?

STATUTES INVOLVED

The statute under which the Petitioner was prosecuted and convicted, and upon the terms of which his conviction turns, is 18 U.S.C., § 1702, "Obstruction of Correspondence". This statute provides:

> "Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to

whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 778." 18 U.S.C., § 1702, p. 24.

Also cited in this petition is 18 U.S.C., § 1708, "Theft or receipt of stolen mail matter generally". This statute provides,

"Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secrets, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

"Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

"Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted—

"Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

"June 25, 1948, c. 645, 62 Stat. 779; May 24, 1949, c. 139, § 39, 63 Stat. 95; July 1, 1952, c. 535, 66 Stat. 314." 18 U.S.C., § 1708, pp. 41-42.

STATEMENT OF FACTS

This case involves the question of whether the obstruction of a package of pre-printed checks is a violation of 18 U.S.C., § 1702.

On or about October 27, 1972, Mrs. Marian Woodward Hannon, mother of the Petitioner, ordered from The Indiana National Bank of Indianapolis pre-printed checks to be sent to her address at 3607 Alexandria Court, Indianapolis. The Indiana National Bank in turn ordered these checks from the Deluxe Check Printers, who filled the order and sent the package of personalized checks to Mrs. Hannon by fourth class mail. There was a non-personalized message, but no correspondence with Mrs. Hannon, in the package which was delivered to her address by postal carrier on or about November 6, 1972. The postal carrier delivered the package to Mrs. Hannon's son, the Petitioner Anthony Seymour Bradford.

On November 28, 1972, the Petitioner was apprehended with the printed checks in his possession.

On January 23, 1972, a one count indictment was brought charging Anthony Seymour Bradford with the obstruction of correspondence, a violation of Title 18, United States Code, § 1702. The case was tried in United States District Court, Southern District of Indiana, before a jury on January 26, 1973. On said date, the jury found the Defendant guilty as charged in the indictment.

Bradford filed a motion for judgment of acquittal on January 30, 1973, which motion was overruled by the Court on February 2, 1973. On March 16, 1973, the Petitioner was sentenced pursuant to the Federal Youth Corrections Act and on March 28, 1973 delivered to F.Y.C., Ashland, Kentucky.

On March 26, 1973, Anthony Bradford was given leave by the Court to appeal *in forma pauperis*. J. Maurice Harrell withdrew as attorney for Bradford on April 2, 1973, and by May 9, 1973, Howard J. DeTrude, Jr. was appointed counsel for the Petitioner for his appeal.

An appeal of Petitioner's conviction was filed in the United States Court of Appeals for the Seventh Circuit on June 21, 1973, and oral argument was heard on October 26, 1973.

A three judge panel of the Seventh Circuit Court of Appeals considered the appeal and affirmed the conviction. The Court concluded that "The box of printed checks in the present case, in fact, contained a non-personal message to the customer and, thus, was clearly within the provisions of § 1702, . . ." and that "When § 1702 is read as a whole, the most reasonable interpretation of 'correspondence' is that the term was meant to encompass mailed matter of the type here involved, regardless of class". Opinion, Appendix A, page 3A. The judgment and opinion of the Court were filed on March 28, 1974. No petition for rehearing was filed.

The office of the Petitioner's attorney received in the mail copies of the judgment and opinion on April 1, 1974. On April 1, 1974, Howard J. DeTrude, Jr., appointed pauper appellate counsel for Anthony Bradford, was out of office. He did not return to the office until April 8, 1974. On April 10th, Mr. DeTrude wrote Anthony Bradford a letter advising him that his conviction had been affirmed, and informing him of his right to petition the Supreme Court for a writ of certiorari. This letter also stated that based upon the evidence presented at trial and the issue preserved on appeal, the chance of review by the Supreme Court would be "very slim". The letter asked

that Anthony Bradford advise his attorney immediately of his desires.

Bradford replied in a letter of April 22, 1974, that he wished to petition for a writ of certiorari to the Supreme Court. His letter reached his attorney's office on April 25, 1974. According to Rule 22(2) a motion for an extension of time to file a petition for a writ of certiorari to review a Court of Appeals judgment in a criminal case must be filed with the Clerk of the Supreme Court within thirty (30) days after entry of such judgment.

In this instance, thirty (30) days after the entry of judgment on March 28, 1974, was April 27, 1974—two (2) days after the office received Anthony Bradford's letter informing his attorney of his desire to file a petition for a writ of certiorari. With only two (2) days left of the thirty (30) days, there was insufficient time available to adequately prepare a petition for a writ of certiorari to the Supreme Court. A motion for an extension of time within which to file a petition for a writ of certiorari was then drawn up, sent, and received in the Office of the Clerk of the United States Supreme Court on May 3, 1974.

The Clerk returned the motion, stating that the Court could not grant an extension of time once the time for filing had expired but, a petition for certiorari would be docketed upon receipt, and sent to the Court with a notation as to its untimeliness.

> "It should be noted that despite the time requirements of Rule 22(2), the Supreme Court has discretion to grant certiorari not timely filed. See Taglianetti v. United States (1969) 89 S. Ct. 1099, note 1: 'Although this petition for certiorari was not filed within the 30 days allowed by the Court's Rule 22(2), the time limitation is not jurisdictional. Heflin v.

United States, 358 U.S. 415, 418, n. 7, 79 S.Ct. 451, 453, 3 L.Ed. 2d 407 (1959), and does not bar our exercise of discretion to consider this case.' " 5 Bender's Federal Practice Forms, p. 515.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. FOURTH CLASS MAIL IS NOT "CORRESPONDENCE" FOR PURPOSES OF 18 U.S.C., § 1702, PERTAINING TO THE "OBSTRUCTION OF CORRESPONDENCE".

The decision below should be reviewed because the Circuit Court of Appeals erroneously construed the term correspondence" found in § 1702. Title 18 U.S.C., § 1702 provides,

> "Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secrets, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

The Court defined the term "correspondence" overly broad to include the package of checks sent by Deluxe Check Printers to Marian W. Hannon, and taken from the mail by her son, Petitioner Anthony Bradford.

The package sent by Deluxe Printers was sent by fourth class mail. It was a box of checks, and contained a form message, non-personalized, which the company inserts into each box of checks ordered. Mrs. Hannon originally

ordered the checks from The Indiana National Bank. The bank then ordered them from Deluxe Check Printers who simply filled the order, sending it to the address given it by The Indiana National Bank. At no time was there any correspondence between Deluxe Check Printers and Marian W. Hannon.

To adequately resolve the issue raised herein we must first resolve two preliminary questions:

1. What is "correspondence"?
2. What is "obstruction of correpondence"?

WHAT IS "CORRESPONDENCE"?

The term "correspondence" is not specifically defined by Congress. In his brief below, the Appellant Bradford submitted the Webster's Third New International Dictionary definition:

> "The communication between persons by an exchange of letters; any communication by letter."

This definition was criticized by the Circuit Court of Appeals at page two of its opinion below as equating "communication between persons" with "personal correspondence", and interpreting "correspondence" as used in § 1702 as "personal correspondence".

In its criticism, the Court ignored the significant references in the definition to "an exchange of letters", and "communications by letter".

This reference was reiterated in the Black's Law Dictionary definition of "correspondence":

> "Interchange of written communications. The letters written by a person and the answers written by the one to whom they are addressed."

Though no Court is bound by such authority, reference to it is useful to illustrate the general and legal usages of the word "correspondence". In the absence of Congressional definition, such interpretations define the context within which the word "correspondence" is used. In both of these definitions, that context is one of written letters and the responses thereto.

These definitions denoting correspondence as communications between persons in letter form are not directly refuted by either the Appellee in its brief or by the Circuit Court of Appeals in its opinion below.

At page two of its opinion, the Court contends that:

> ". . . even if we assume arguendo that Webster's dictionary definition of 'correspondence' as 'communication between persons' has some relevance in construing § 1702, defendant's argument nevertheless fails to exclude the many forms of nonpersonal communication which can travel second, third, or fourth class. The box of printed checks in the present case, in fact, contained a nonpersonal message to the customer and, thus, was clearly within the provisions of § 1702."

The Petitioner's argument does exclude second, third, and fourth class mail from its definitions because its definitions do not stop with "communication between persons" but includes "exchange of letters"; "any communication by letter"; and "letters written", and "answers written".

Both federal statute and case law support the Petitioner's contention that the word "correspondence", as used in 18 U.S.C., §1702, means letters—first class mail—and does not mean packages—fourth class mail.

Second class mail as defined in 39 U.S.C., § 4351, and third class mail as defined in 39 U.S.C., § 4451, do not

provide for the mailing of correspondence. They are limited in scope to the mailing of newspapers, periodicals and what is commonly referred to as "junk mail". 39 U.S.C., § 4551, defines fourth class mail to include packages. The use of fourth class mail for personal correspondence is expressly prohibited under the terms of 39 U.S.C., § 4555, which reads, in part, as follows:

> "(a) The sender may not place on or enclose in fourth class mail marks that have the character of personal correspondence . . ." 39 U.S.C., § 4555, p. 330.

The language used by Congress in enacting § 1702 clearly indicates an intent to limit the section to correspondence; that is, to letters sent by one party to another, through first class mail:

> "The statute contemplates the existence of correspondence—the sending of *a letter* to the addressee . . .".
>
> *United States v. Grieco* (S.D. N.Y. 1960) 25 F.R.D. 58, 59.

The Appellee and Circuit Court of Appeals refuted this argument with the rationale that:

> "Vast amounts of non-personal communication travel through the mails in second, third, and fourth class—but it is all communication nonetheless."

The fact that it is all communication is not enough. Correspondence is more than communication. It is written, in letter form, and is mutual, between two parties. It is not merely from one party to the other with no communication in return.

The Appellee and the Circuit Court of Appeals cite numerous cases to support their arguments that § 1702

is not restricted to first class mail, and the Appellee states at page five of his brief:

> "A letter can be sent first class or third class (see 39 U.S.C. 4251 and 39 U.S.C. 4451); a postal card (or post card) can be sent first class or third class (see 39 U.S.C. 4251 and 39 U.S.C. 4451) and a package can be sent first class, third class, or fourth class (see 39 U.S.C. 4251, 39 U.S.C. 4451, and 39 U.S.C. 4552)."

This statement is misleading. The issue is not whether § 1702 distinguishes among classes of mail. The critical distinction is between mail which is correspondence and mail which is not. The fact that a piece of mail falls within or without first or fourth class mail is relevant only if that piece of mail is part of the correspondence between two parties. Just as all letters are not necessarily first class mail, so are they all not necessarily correspondence. But citing *United States v. Grieco, supra,* the Petitioner reasserts that for a piece of mail to be correspondence, it is necessary that it be a letter.

Equally important is the fact that of the twenty-two cases arising out of §1702 reported in the West Reporter System in the Federal Practice Digest, and Modern Federal Practice Digest under the topic of *Post Office,* Key Number 43, twenty-one cases dealt expressly with letters, or with personal checks or credit cards sent in letters. Only one dealt with a package. This was *McGowan v. United States* (9th Cir. 1967), 376 F.2d 122, involving a package of two diamond rings. The Court therein noted that while the superseding indictment invoked § 1702, the original indictment invoked § 1708. The distinction between the two sections is noted in the discussions of the next issue.

WHAT IS "OBSTRUCTION OF CORRESPONDENCE"?

In addressing the question of whether fourth class mail is embraced within the provisions of 18 U.S.C., § 1702, the Court must consider that the issue here is not simply whether a package of bank checks is "correspondence". Section 1702 provides penalties if a person takes a letter, postal card, or package with "design to obstruct the correspondence". Thus, interwoven with the issue of whether a package is correspondence is the question here of whether Anthony Bradford took this package of checks from the postal carrier "with design to obstruct the correspondence".

If a package of checks is not correspondence because it is fourth class mail and because "correspondence" connotes personal communication between two specific parties, and not general mail sent by a business to an address, then Anthony Bradford cannot be held under § 1702, to have had any design to obstruct the correspondence. For him to have had such a design, it was necessary that he take the correspondence with the purpose of blocking its transmission from sender to recipient. For such a purpose to exist it was necessary for Bradford to intend, prior to the obstruction, to obstruct certain correspondence—"the" correspondence between two parties. There was no proof of such an intent or design here. All that was proven was that when the postal carrier came up to Marion W. Hannon's house with the package of checks to be delivered to her, Anthony Bradford received the mail, and subsequently appropriated the checks to his own use. There is no evidence that he knew the package of checks was coming in the mail, or that he schemed or designed to take them—much less "obstruct any correspondence". There was no correspondence to obstruct. There was a package of checks, containing an impersonal note sent with every

package of checks ordered from Deluxe Check Printers by The Indiana National Bank. If there was any correspondence, it was between Marion W. Hannon and The Indiana National Bank, and between The Indiana National Bank and Deluxe Check Printers. There was none between the Deluxe Check Printers and Marian W. Hannon.

The Circuit Court of Appeals at page two of the opinion below reasoned that all communications are not necessarily personal correspondence, and that therefore, "correspondence" under § 1702 includes such things as junk mail and newspapers. The Court's definition is overly broad. It assumes that § 1702 was meant to cover all communications. It was not. "Communications" and "correspondence" connote two different concepts. By its nature, "correspondence" is unique to two parties conveying personal communications. Even if non-personal communications are sent, § 1702 does not necessarily cover them because the main thrust of § 1702 is to define and penalize acts done intentionally, acts designed to block the "correspondence" between parties.

On page three of the opinion below, the Circuit Court of Appeals said that:

> "When § 1702 is read as a whole, the most reasonable interpretation of 'correspondence' is that the term was meant to encompass mailed matter of the type here involved, regardless of class. The statute refers to the taking of letters, postal cards, and packages, with no indication that the contents of such items are determinative of whether there is a violation."

In so interpreting the reference to "letters, postal cards and packages", the Court ignores the phrase "obstruct the correspondence" and concentrates instead on the word "correspondence", equating it with "letters, postal cards

and packages". This is erroneous and ignores the importance of the phrase "obstruct the correspondence". The words are important because the contents of the types of mail listed are determinative of whether there is a violation. For there to be correspondence, there must be a particular communication between two parties. For there to be a crime here, there must be a pre-planned design to block this particular communication. If the type of mail contains no correspondence, then no correspondence can be obstructed.

The issue then is whether this taking of a package of checks is the type of crime which was contemplated by Congress when it enacted § 1702, dealing with the "obstruction of correspondence".

It is the Petitioner's contention, a contention misinterpreted by both the Appellee and the Circuit Court of Appeals, that he was indicted under the wrong section. Anthony Bradford was indicted under § 1702, "Obstruction of Correspondence". He should have been indicted under § 1708, "Theft on Receipt of Stolen Mail Matter Generally". This section more accurately and specifically describes the acts which the facts of this case reveal that the Petitioner committed. Section 1708 provides in pertinent part:

> "Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box . . . or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes . . . any article . . . or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein . . ."

An indictment under § 1708 is consistent with the Petitioner's argument that what he did was take a package, fourth class mail, and not that he obstructed any correspondence, as charged under § 1702.

Case law clearly distinguishes the intent of Congress in enacting § 1702 from its intent in enacting § 1708.

> "The nature of the offenses created by the two sections differ in essential particulars. Section 5469 [section 1708 of this title] is concerned more especially with thefts and embezzlements from the mails for purposes of gain. Section 3892 [this section (1702)] deals with unauthorized meddling with the mails for the purpose of gratifying mere malice or a prying curiosity. The intent or purpose which constitutes the gist of the offense is one thing in one of the sections and quite a different thing in the other." *United States v. Davis* (D.C. Mich. 1888), 33 F. 865.

Another *United States v. Davis,* was cited in *United States v. Trexler* (5th Cir. 1973), 474 F. 2d 369, 371, in support of the legal precept that:

> "As a general rule, the Government cannot broaden an indictment so as to convict the defendant on different facts from those charged in the indictment . . . *U. S. v. Davis,* 5th Cir., 1972, 461 F. 2d 83, 90-91."

In the instant case, the indictment charging Anthony Seymour Bradford with the "obstruction of the correspondence" of Marian W. Hannon under § 1702 was broadened by the Government in its presentation of evidence to convict Bradford on facts which may have supported a conviction under § 1708, but not under § 1702.

In § 1708, Congress intended generally to protect all types of mail. The same penalty is applicable for a person stealing mail of any kind, be it first or fourth class. Section 1702 has an application limited to correspondence

contained in letters, postal cards and packages. The reason for this is obvious. Section 1702 is designed to protect the privacy of mails and to keep people from prying into the business of others or stopping the flow of first class mail. It is not designed as a statute to be used in prosecuting someone for stealing articles from the mail.

In its brief below, the Appellee contends that "It is difficult to imagine a business matter more deserving of protection than the receipt of checks". Were these checks made out to the Appellant, as correspondence in a particular ongoing business transaction, this argument might be valid. There was no business correspondence between Deluxe Check Printers and Marion W. Hannon. They simply sent her a package. She never wrote them a single letter.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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